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**Fort Dearborn Company and District Council Four,
Graphic Communications Conference of the In-
ternational Brotherhood of Teamsters. Case 13—
CA—046331**

November 18, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND SCHIFFER

On September 28, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 11. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order and remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB No. 11, which is incorporated herein by reference. The judge's recommended Order, as further modified herein, is set forth in full below.¹

ORDER

The Respondent, Fort Dearborn Company, Niles, Illinois, its officers, agents, successors, and assigns, shall

¹ We adopt the judge's recommended tax-compensation and SSA-notification remedies in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall substitute a new notice in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

1. Cease and desist from

(a) Threatening employees with closer scrutiny if they engage in activities on behalf of the Union.

(b) Threatening employees with discharge if they engage in activities on behalf of the Union.

(c) Suspending employees because of their support for and activities on behalf of the Union.

(d) Discharging or otherwise discriminating against employees for supporting District Council Four, Graphic Communications Conference of the International Brotherhood of Teamsters, or any other labor organization.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Marcus Hedger full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Marcus Hedger whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Marcus Hedger for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge, and within 3 days thereafter, notify the employee in writing that this has been done and that the suspension and discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Niles, Illinois facility copies of the attached notice marked "Appendix."² Copies of the notice, on forms

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals."

provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 4, 2010.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 18, 2014

Mark Gaston Pearce, Chairman

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring.

This case involves allegations that the Respondent violated Section 8(a)(1) of the Act based on an alleged threatening statement made to Union Chief Steward Marcus Hedger by the Respondent's senior vice president for operations, William Johnstone. The judge found that Johnstone stated he was tired of the "union circus," and he advised Hedger that "we're watching you, we are going to catch you, and we are going to fire you." Sure enough, the Respondent subsequently suspended and discharged Hedger, ostensibly because Hedger gave an unauthorized visitor access to the production area of the plant and was not truthful during the Respondent's inves-

tigative interviews of Hedger. The General Counsel maintains that the suspension and discharge constituted antiunion discrimination in violation of Section 8(a)(3) and (1). In the circumstances here, I agree that the Respondent violated the Act in the above respects, but only for the following reasons.

First, the record establishes that the above statement by the Respondent—expressing hostility about a "union circus" followed by the warning, "we're watching you, we are going to catch you, and we are going to fire you"—constituted unlawful restraint, coercion and interference for purposes of Section 8(a)(1). Although the judge found that the "watch, catch and fire" warning might have pertained to conduct by Hedger unrelated to union conduct, I believe such an interpretation is implausible given the fact that this warning was immediately preceded by the hostile "union circus" comment.

Second, I believe the unlawful "watch, catch and fire" threat, stated roughly 2 months before Hedger's suspension and discharge, is sufficient to satisfy the General Counsel's initial burden under *Wright Line* to support an inference that antiunion hostility was a "motivating factor" in the suspension and discharge decisions. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 889 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); see also *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). In this regard, I do not pass or rely on any other evidence of unlawful motivation referenced by the judge.

Third, the record shows there was merit in one of the Respondent's articulated explanations for Hedger's discharge: Hedger's untruthfulness during the Respondent's investigation. The judge found that Hedger escorted a friend, who was walking a bicycle, through the production area of the plant. When interviewing Hedger about this incident, the Respondent advised Hedger that "he could be terminated if he did not cooperate in the investigation," and Hedger plainly lied. Less than 1 week after the incident occurred, Hedger was asked "if he brought somebody into the plant" and for "the name of the person who was with him in the plant," and Hedger stated he did not recall. The judge found that Hedger displayed a "lack of cooperation" that was "foolish and unnecessary," but the judge suggested this misconduct was immaterial because, even without getting the information from Hedger, the Respondent "had all the information it needed to investigate whether its confidential business information had been compromised." The fact that an employer might already have accurate information from other sources does not negate the substantial misconduct that occurs when an employee, during an investigative interview, intentionally lies. Even if an

employee's other misconduct might not reasonably warrant discipline or discharge, there are many circumstances where intentional misrepresentations during an investigative interview, standing alone, can be a lawful basis for discharge. In other words, there are circumstances where an employer can conclude that the "cover-up is worse than the crime," which can result in lawful discipline or discharge under *Wright Line*, even though the General Counsel has satisfied his initial *Wright Line* burden.

Fourth, although untruthfulness may constitute a lawful nondiscriminatory reason warranting an employee's discharge, I believe the Respondent, in two respects, has not satisfied that burden in the instant case. Most important, the Respondent articulated *two* reasons for Hedger's discharge: his untruthfulness *and* his misconduct in giving his friend unauthorized access to the plant. The Respondent does not contend that Hedger's untruthfulness, standing alone, would have warranted his discharge. Second, the record does not establish that the Respondent has proven, under *Wright Line*, that Hedger's actions would have warranted his discharge in the absence of his protected activity.

Finally, I agree the record does not support a finding that the judge's credibility findings were incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). Additionally, I believe the judge did not err when he denied the Respondent's motion to dismiss the complaint, which argued the Region improperly resumed Board proceedings (which had been held in abeyance pending grievance arbitration) after the Respondent withdrew from an arbitration proceeding based on a disagreement regarding the scope of the issues presented.

Accordingly, for the above reasons, I concur in the instant case and I join in issuing the Order set forth above.

Dated, Washington, D.C. November 18, 2014

Phillip A. Miscimarra,

Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with closer scrutiny because you engage in activities on behalf of the Union.

WE WILL NOT threaten you with discharge because you engage in activities on behalf of the Union.

WE WILL NOT suspend, discharge, or otherwise discriminate against any of you for supporting District Council Four, Graphic Communications Conference of the International Brotherhood of Teamsters, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Marcus Hedger full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Marcus Hedger whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

WE WILL compensate Marcus Hedger for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Marcus Hedger, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

FORT DEARBORN COMPANY

The Board's decision can be found at www.nlr.gov/case/13-CA-046331 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

